BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREN R. WOODS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,001,303
SENIOR SERVICES OF SOUTHEAST KANSAS	)	
Respondent	)	
AND	)	
	)	
ALLIED NATIONWIDE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the January 16, 2008 Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded an 18 percent whole body functional impairment, followed by a 40.5 percent permanent partial general body work disability for injuries suffered on June 20, 2001.

Claimant appeared by her attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Troy A. Unruh of Pittsburg, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on April 15, 2008. The parties agreed at oral argument to the Board that the 35 percent task loss opinion of Edward J. Prostic, M.D., the only task loss opinion in this record, is to be utilized by the Board when computing any permanent partial general body disability award in this matter.

ISSUE

What is the nature and extent of claimant's disability in this matter? More particularly, what, if any, wage loss has claimant experienced as the result of the injuries suffered on June 20, 2001? Claimant argues that she put forth a good faith effort in her attempts to find a job after her injury. Therefore, claimant alleges entitlement to a

100 percent wage loss for the injuries suffered on June 20, 2001. Respondent alleges that claimant has not put forth a good faith effort to find a job and, therefore, a wage should be imputed to claimant pursuant to K.S.A. 44-510e and *Foulk*.[1]

FINDINGS OF FACT

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant worked as an area supervisor for respondent, helping coordinate respondent's kitchens. On June 20, 2001, claimant injured her low back while lifting canned goods at respondent's Pittsburg, Kansas facility. Claimant initially sought treatment with her personal physician, Anand Balson, M.D., of Coffeyville, Kansas. Claimant left her employment with respondent on September 14, 2001, for a better paying job with an employer called Monsour's. Claimant remained there until November 9, 2001. At that time, her back continued to bother her and Dr. Balson thought claimant would be better off not working.

Claimant was referred for additional medical treatment and underwent an L4-5 diskectomy, laminectomy and foraminotomy with Steven E. Gaede, M.D., on February 27, 2002. The surgery provided little relief, and claimant was ultimately provided a spinal stimulator. Claimant also received epidural injections, medication and physical therapy. Claimant was referred to board certified anesthesiologist Clinton Scott Anthony, D.O., on February 14, 2002, for pain management, which was Dr. Anthony's specialty. Dr. Anthony performed a nerve block on that date, which provided good benefit for the duration of the local anesthetic. Unfortunately, a steroid injection provided no benefit. When claimant returned to Dr. Anthony on July 26, 2002, they discussed the use of the spinal cord stimulator. Claimant had persistent pain in an extremity with her L5 nerve root. On January 20, 2005, Dr. Anthony performed a trial run on claimant with the stimulator. The initial attachment was external. When claimant returned on January 25, 2005, she reported difficulty determining if she had obtained 50 percent improvement. Dr. Anthony was not thrilled with this result. Nevertheless, the implantation procedure was performed on October 13, 2005. Claimant reported that she had obtained good relief. By December 31, 2005, claimant had reached maximum medical improvement (MMI). Dr. Anthony limited claimant to sedentary work with no lifting over 25 pounds. Dr. Anthony did not provide claimant with a rating as he does not rate his patients.

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[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Claimant was referred by a nurse case manager for a second opinion to board certified occupational medicine specialist Dennis A. Estep, D.O., on November 15, 2002. Claimant underwent an EMG, which displayed a prolonged right tibial motor nerve latency. Claimant was also sent for a functional capacity evaluation (FCE) on May 20, 2003. Claimant was also referred to licensed neuropsychologist Dale A. Halfaker, Ph.D., on April 7, 2003, by Dr. Estep, for a comprehensive neuropsychological assessment. Dr. Halfaker noted histrionic personality features with claimant and some symptom magnification. However, he also testified claimant was probably doing so unconsciously.

Dr. Estep noted submaximal effort by claimant during the FCE. Occupational therapist Nancy Dickey, who performed the FCE, also found less than maximum effort by claimant, and identified it as voluntary. Claimant's movement patterns did not indicate her pain was as high as what she said, and claimant showed improvement when distracted. Dr. Estep restricted claimant to no lifting over 20 pounds up to waist level and minimized work below knee level and above chest level.

Claimant was referred by the ALJ for an IME with board certified orthopedic surgeon Randall L. Hendricks, M.D., on August 9, 2006. Claimant was scheduled for additional EMGs and nerve conduction studies, and Dr. Hendricks also recommended a new FCE. Claimant was referred for a second FCE on August 31, 2006, with clinical care coordinator C. J. Dailey. During the FCE, claimant demonstrated a medium physical demand with a maximum lifting capacity of 40 pounds occasionally and 25 pounds frequently. Mr. Daley also reported inconsistencies during the test, with 4 out of 7 tests being determined invalid due to poor effort by claimant. Dr. Hendricks noted the invalid tests, but gave claimant the benefit of the doubt and did not increase her lifting restrictions. He did testify that 4 of 7 invalid tests indicated something being done purposely.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on April 26, 2006. From an orthopedic basis, claimant was found to be permanently and totally disabled from substantial gainful employment because of her orthopedic condition. Dr. Prostic limited claimant to no lifting greater than 20 pounds occasionally or 5 pounds frequently. Claimant was to avoid frequent bending or twisting at the waist, avoid forceful pushing or pulling, avoid more than minimal use of vibrating equipment and avoid captive positioning. When presented with the task list of vocational expert Jerry Hardin, Dr. Prostic found claimant unable to perform 18 of the 51 tasks on the list for a 35 percent task loss. As noted above, this is the only task loss opinion in this record.

Claimant quit her employment with Monsour's in November 2001 and did not again search for a job until 2002. During 2002, she only spent about 6 months looking for a job. This was so she could maintain her unemployment. Claimant did not again look for a job until May 2006. From May 2006 until her deposition on November 8, 2007, claimant could

verify only 51 contacts. While she testified to other contacts and said she contacted some of the employers more than once, the evidence does not support claimant's alleged job search. Claimant's educational background includes an Associate of Applied Science degree, a certification in Food Service Production and Management, and Applied Computer Software and she is a certified dietary manager.

Claimant argued to the ALJ that she was permanently and totally disabled. The ALJ found claimant to be able to work and denied her request for permanent total disability (PTD) compensation. Claimant's brief to the Board does not allege entitlement to PTD, but, instead, asks for a 100 percent actual wage loss to go with her 35 percent task loss.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[5]

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[2] K.S.A. 44-501 and K.S.A. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

[5] K.S.A. 44-510e.

As noted above, there is only one task loss opinion in this record, Dr. Prostic's 35 percent, and the parties stipulate to the use of that opinion in the calculation of this award.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The ALJ determined that claimant had not put forth a good faith effort to obtain work after her injuries working with respondent and after she quit her job with Monsour's. The Board agrees. There is a four-year gap when claimant did no job hunting, although during a portion of that time she was undergoing treatment for her back injury. After May 2006, the search was again instituted, but was limited in its scope. The number of job contacts was less than acceptable for the Board to find good faith. Therefore, a post-injury wage must be determined and assessed in calculating this award.

Jerry Hardin, a vocational expert well versed in workers compensation litigation, usually determines a claimant's wage earning ability. However, in this instance, Mr. Hardin found that claimant was permanently and totally disabled, a finding rejected by both the ALJ and the Board. Therefore, there is no wage earning ability opinion in this record. The ALJ used the national minimum wage in determining claimant's ability to earn wages. However, the ALJ used the more recent increased hourly rate of $5.85 in his calculations. The federal minimum wage did not increase to $5.85 until July 2007. By that time, with the accelerated payment calculations in the Kansas Workers Compensation Act, claimant's entire award would be due and owing. The Board finds that using the federal minimum wage to determine claimant's ability to earn wages in this instance is proper, but the correct

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[6] *Foulk, supra*.

[7] *Copeland, supra*.

[8] *Id.* at 320.

hourly rate of $5.15 should be used. This equates to a weekly wage of $206.00 which, when compared to claimant's average weekly wage of $430.89, calculates to a wage loss of 52 percent. This, when averaged with the 35 percent task loss, equates to a permanent partial disability of 43.5 percent. The Award of the ALJ is modified to reflect this change, but will be affirmed in all other regards.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to show a wage loss of 52 percent and a resulting permanent partial work disability award of 43.5 percent, but is affirmed in all other regards.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 16, 2008, should be, and is hereby, modified to find claimant suffered a wage loss of 52 percent and a resulting permanent partial whole body work disability of 43.5 percent, but in all other regards is affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Karen R. Woods, and against the respondent, Senior Services of Southeast Kansas, and its insurance carrier, Allied Nationwide Insurance Company, for an accidental injury which occurred on June 20, 2001, and based upon an average weekly wage of $430.89.

Claimant is entitled to 79 weeks of temporary total disability compensation at the rate of $287.26 per week totaling $22,693.54, followed by 152.69 weeks at the rate of $287.26 per week totaling $43,861.73 for a 43.5 percent permanent partial general work disability, making a total award of $66,555.27.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge